Coloring Within the Lines—The New Law Regarding Race-Conscious Reapportionment

I. INTRODUCTION

The Civil Rights Act of 1964 was signed on July 2 of that year,[1] in an attempt to end the racial discrimination that has plagued the United States from its beginning. The Act prohibited discrimination primarily in public accommodations, programs receiving federal assistance, and employment.[2] However, as President Johnson signed the legislation, he knew that more was needed to achieve the goal of racial equality, and he immediately began to push for the next civil rights bill. He told Deputy Attorney General Nicholas Katzenbach: "I want you to write me the goddamndest, toughest voting rights act that you can devise."[3] Johnson had recognized the primacy of the franchise early in the civil rights movement and had told Hubert Humphrey during the battle for the 1964 Act, "Yes, yes, Hubert, I want all of those other things—buses, restaurants, all of that—but the right to vote with no ifs, ands, or buts, *that's the key*."[4]

This Note provides an overview of the legal response to black disenfranchisement in the United States and focuses on recent attempts to remedy such discrimination via the creation of state legislative and congressional districts in which blacks comprise a majority ("majority-minority districts"). The Note then analyzes the three cases decided by the Supreme Court in 1993 that address majority-minority district creation.

II. HISTORY OF BLACK DISENFRANCHISEMENT

The Fifteenth Amendment to the Constitution, enacted in 1870, provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[5] One may wonder why there was any need to address this issue in 1964, nearly a century later. The "right to vote,"

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[1] Civil Rights Act of 1964 (codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a–1975d, 2000a to 2000h-6), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART II, at 1054 (Bernard Schwartz ed., 1970).

[2] STATUTORY HISTORY OF THE UNITED STATES, *supra* note 1, at 1018–20.

[3] MERLE MILLER, LYNDON, AN ORAL BIOGRAPHY 371 (1980).

[4] *Id.* (emphasis added).

[5] U.S. CONST. amend. XV, § 1.

however, is not as simple as it appears. Even without inquiring into who qualifies as a citizen, speaking of one's right to vote raises questions concerning procedural hurdles such as registration, educational requirements such as literacy, and the system for determining a winner (*i.e.*, first-past-the-post v. runoff systems). A *representative* democracy composed of geographic districts raises further questions of whether to have single-member or multimember districts and how to draw them. Even a completely neutral and fair-minded person, when attempting to confront these issues, is haunted by Arrow's mathematical proof that whatever system created will be imperfect.[6]

The Constitution originally left virtually all decisions regarding voting to the states.[7] As more people were considered worthy of the rights traditionally afforded only to educated, wealthy, white, male citizens, five of our twenty-seven Constitutional amendments, including the Fifteenth Amendment mentioned above, expanded voting rights.[8] That nearly one-fifth of our amendments address this issue affirms the belief held by many courts and commentators (and by Lyndon Johnson) that the guaranteed right to vote is an essential ingredient to a successful democracy.[9]

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[6] Kenneth J. Arrow proved mathematically that a perfect voting system is not possible because of a problem, recognized since the eighteenth century, called the "cyclical majority." Arrow's proof has withstood critical examination and numerous attempts to avoid his depressing conclusion. *See* JOHN BONNER, INTRODUCTION TO THE THEORY OF SOCIAL CHOICE 56–71 (1986).

[7] The Constitution required only that whatever qualifications were needed to vote for members of a state's largest legislative branch would also be needed to vote for members of the U.S. House of Representatives. U.S. CONST. art. I, § 2, cl. 1. Note that prior to the passage of the Seventeenth Amendment in 1913, U.S. Senators were elected by members of their state legislatures. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

[8] In addition to the Fifteenth Amendment, the Fourteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments addressed voting rights. The Fourteenth Amendment, while not expressly prohibiting the denial of voting rights to otherwise eligible black citizens, penalized such discrimination by reducing the state's representation in the House of Representatives in proportion to the number of 21-year-old males who were denied the right to vote. U.S. CONST. amend. XIV, § 2. The Nineteenth Amendment prohibited denial of the right to vote on the basis of sex. U.S. CONST. amend. XIX, cl. 1. The Twenty-fourth Amendment disallowed the use of a poll tax as a means of withholding the right to vote in presidential and congressional elections. U.S. CONST. amend. XXIV, § 1. This practice was also prohibited in state elections by Harper v. Virginia, 383 U.S. 663 (1966). The Twenty-sixth Amendment prohibited age discrimination in voting rights against all those over 18. U.S. CONST. amend. XXVI, § 1.

[9] The right to vote "is regarded as a fundamental political right, because [it is] preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Unfortunately, the enigmatic nature of the "right to vote," though buttressed by numerous amendments to our Constitution, has given rise to manipulation. Most forms of subverting the right to vote may be classified either as attempts to prevent certain groups (usually blacks) from voting altogether, or as attempts to dilute those groups' votes so as to render them ineffective.

A. *Racially-Applied Voting Requirements*

Having gained popular support via the massive civil rights movement and Northern outrage over Southern brutalization of black activists,[10] the voting bill that Lyndon Johnson had so forcefully demanded was enacted as the Voting Rights Act of 1965.[11] The Act was an attempt to enforce the Fifteenth Amendment and to end the practice, mostly Southern, of applying facially neutral voting requirements, such as literacy tests, in a discriminatory manner.[12] Section two of the Act provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen . . . to vote on account of race or color."[13] Section three provided strong judicial remedies, including the power to appoint federal examiners to oversee local elections and to suspend "tests or devices" found to have "been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color . . . ."[14]

Much of the success of the 1965 Act, however, resulted from section five. This section applied to: (1) states that on November 1, 1964, maintained any voting test or device (as determined by the Attorney General); (2) states in which less than fifty percent of the voting-age population was registered to vote; and (3) states in which less than fifty percent of the voting-age population voted in the November 1964 presidential election.[15] Although facially neutral, section five effectively applied only to Southern states.[16] "Section five states"

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[10] JACK M. BLOOM, CLASS, RACE, & THE CIVIL RIGHTS MOVEMENT 184 (1987).

[11] 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1992).

[12] *See* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 8-10 (1992).

[13] The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1992)).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 438 (§ 4(b)). Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of Arizona and North Carolina were covered under the

were required to receive approval from the United States Department of Justice before enacting "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . ."[17] The provision was so far-reaching that it required Justice Department approval for a section five state to change a polling location.[18]

The drastic measures provided for in section five were originally seen as temporary measures needed only until blacks were successfully integrated into Southern political systems, and they were scheduled to expire after five years.[19] Congress, however, amended the Act in 1970 and again in 1975 to extend the lifespan of section five.[20] The 1975 amendment also expanded the Act's coverage to include language minorities.[21] By providing for massive Justice Department oversight of the worst states, the Voting Rights Act was largely successful in removing barriers to the voting rights of blacks.[22]

B. *Dilution*

A single person's vote, although containing some romantic value in and of itself, is an effective tool of democracy only when combined with many other votes.[23] In a representative democracy, this fact gives rise to the ability to make some votes less powerful than others. The representation of the various states in Congress provides a useful example. Representation in the U.S. Senate, in contrast to representation in the House of Representatives, does not vary by population. A Senator from a less populous state will therefore represent fewer people than a Senator from a more populous state; thus voters in the less populous states have more "power" in the Senate than voters in more populous

original version of section five. Roy W. Copeland, *The Status of Minority Voting Rights: A Look at Section V Preclearance Protections and Recent Decisions Affecting Multi-member Voting Districts*, 28 HOWARD L.J. 417, 420 n.35 (1985).

[17] The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (1965) (current version at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1992)).

[18] WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 123 (1988).

[19] GROFMAN, *supra* note 12, at 19.

[20] *Id.* at 20–21.

[21] *Id.* at 17.

[22] Cynthia Wright, *The Effects of Sections 2 and 5 of the Voting Rights Act on Minority Voting Practices*, 28 HOWARD L.J. 589, 599–601 (1985).

[23] "[T]he right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects . . . . " City of Mobile v. Bolden, 446 U.S. 55, 78 (1980).

states. The structure of the U.S. Senate, then, does not reach the more abstract problems of a representative democracy discovered by Arrow.[24] It plainly fails to accord even approximately equal weight to each vote. This arrangement, which is unique in our Constitution in that it cannot be changed without the consent of each affected state,[25] is the result of a compromise at the Constitutional Convention to guarantee the less populous states protection from the larger ones.[26] The peculiar structure of the Senate is not the concern of this Note and suffice it to say that its constitutionality is not in question before the Supreme Court.[27] The disproportionate structure of the Senate does not present the same problems as a similar structure would for state legislative or congressional districts, because the "district" lines for the Senate are the various state boundaries and are not subject to frequent change by those who might use such an opportunity for political advantage.

State legislative and congressional districts, however, are redrawn periodically and are subject to political opportunism. Responsibility for the initial redrawing is generally placed with the state legislatures, but is in some states given to the Governor or to a board or commission.[28] Most state legislatures that have this responsibility delegate it to a board or commission, then vote on the plan that is developed.[29] In most states, the Governor has veto power over the plan that is finally approved by the legislature.[30] Without any judicial review, those in charge of the reapportionment process may be tempted to create imbalances of power similar to that in the U.S. Senate, as described above. Such opportunities existed and were acted upon prior to the 1962 Supreme Court decision of *Baker v. Carr*,[31] which overturned prior decisions that held that reapportionment challenges were nonjusticiable political questions.[32] Two years later, in 1964—the same year that the first

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[24] *See supra* note 6.

[25] Article V, which sets forth the procedure for amending the Constitution, provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V.

[26] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87 558 (1969).

[27] The Court has held that "the federal analogy [is] inapposite and irrelevant to state legislative districting schemes." Reynolds v. Sims, 377 U.S. 533, 573 (1964).

[28] NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING PROVISIONS: 50 STATE PROFILES 105 (1989).

[29] *Id.*

[30] *Id.*

[31] 369 U.S. 186 (1962).

[32] *See* Colegrove v. Green, 328 U.S. 549 (1946) (holding that reapportionment challenges presented nonjusticiable questions).

comprehensive civil rights act became law—the Court finally addressed substantive challenges to state legislative and congressional reapportionment plans. In *Wesberry v. Sanders*,[33] the Court struck down Georgia's congressional districting plan in which some districts were nearly three times as populous as others. The Court stated that "the command of Article I, section two, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[34] In *Reynolds v. Sims*,[35] the Court invoked the Equal Protection Clause to establish the "one person, one vote" requirement for state legislative districts. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[36]

The one-person, one-vote standard established in *Wesberry* and *Reynolds*, when combined with the protections of the Voting Rights Act of 1965, presented black voters with an unprecedented ability to participate in the electoral process. Blacks had achieved the enforceable right to cast votes, and their votes were equally weighted with all others. Unfortunately, there was still room for manipulation. Although the one-person, one-vote standard limited the ability of those in charge of reapportionment plans to accord some votes more weight than others, it did not end other forms of vote dilution.

Racial gerrymandering was still used to render even equally weighted votes of blacks less powerful than those of whites. States with multimember districts could include the black population within a large district in which whites made up the majority. Each voter in such a system receives as many votes as there are representatives up for election in that district. To prevent minorities from using all of their votes for one candidate, which could result in the election of at least one representative chosen by the minority, most states enacted "anti-single-shot" laws.[37] These provisions barred any voter from using more than one vote per candidate.[38] Given the prevalence of racially cohesive voting in most areas of the country, whites were able to easily elect all-white representation in such districts.[39] In states with single-member districts, large concentrations of black voters could simply be split into small, ineffective parts

[33] 376 U.S. 1 (1964).

[34] *Id.* at 7–8.

[35] 377 U.S. 533 (1964).

[36] *Id.* at 568.

[37] GROFMAN, *supra* note 12, at 24.

[38] *Id.* at 139–40 n.22.

[39] *See* GROFMAN, *supra* note 12.

of majority-white districts. Although these practices seemingly violated the Voting Rights Act's prohibition against imposing a "practice, or procedure . . . to deny or abridge the right . . . to vote on account of race or color,"[40] it was not easy for Voting Rights Act plaintiffs to obtain relief.

C. City of Mobile v. Bolden

Plaintiffs claiming redress under the Voting Rights Act for dilutive practices met particular difficulty when the Supreme Court held in *City of Mobile v. Bolden*[41] that proof of discriminatory intent was a necessary element for recovery. Noting that section two of the Voting Rights Act simply reiterated protections granted by the Fifteenth Amendment,[42] the *Bolden* court looked to prior reapportionment challenges under the Fifteenth Amendment. Those decisions "made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."[43]

In 1982, in direct response to *Bolden*, Congress amended the Voting Rights Act to make clear that such a showing of discriminatory intent was not required for the Act to be violated. As amended, plaintiffs need only show that "based on the totality of circumstances . . . the political processes . . . are not equally open . . . [to a protected class of citizens] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[44] Majority-minority district creation was not an issue in *Bolden*, and though the amended section two of the Voting Rights Act explicitly rejected requiring proportional representation of any particular group, the application of section two to such "benign" race-conscious reapportionment is unclear. Some cases approvingly cited by *Bolden* would appear to invalidate any racially motivated reapportionment.[45] The primary concern of the *Bolden* court, however, was

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[40] Voting Rights Act of 1965, § 2 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

[41] 446 U.S. 55 (1980).

[42] *Id.* at 60–61.

[43] *Id.* at 62.

[44] 42 U.S.C. § 1973b (1992).

[45] The *Bolden* Court pointed to the failed reapportionment challenge in Wright v. Rockefeller, 376 U.S. 52 (1963), because the plaintiffs failed to prove that the legislature was "motivated by racial considerations," "drew the districts on racial lines," or "contriv[ed] to segregate on the basis of race or place of origin." *Id.* at 52. (editor's case summary). Majority-minority district creation, on the other hand, fits at the very least the first two of those categories.

with attempts to *weaken* the strength of minority votes. The Court noted that it had "repeatedly" stated the requirement of an "invidious purpose" to support a claim of unconstitutional reapportionment.[46] The *Bolden* Court's lack of concern for reapportionment plans that increased the voting strength of minorities become clear where it cited prior case law holding that reapportionments violate the Fourteenth amendment if their purpose is to "invidiously . . . minimalize or cancel out the voting potential *of racial or ethnic minorities.*[47]

D. *The* Gingles *Test*

The "totality of the circumstances" test for a Voting Rights Act violation was first applied in *Thornburg v. Gingles*,[48] a challenge by black voters to the 1982 North Carolina legislative redistricting plan. The plaintiffs alleged that their votes were diluted in one single-member and six multimember districts, thus impairing their ability to elect representatives of their choice in violation of the Voting Rights Act.[49] To conduct its "totality of the circumstances" analysis, the district court utilized the Senate Judiciary Committee Majority Report accompanying the bill that amended section two.[50] That report suggests the following "typical factors" for use in the analysis:

> 1. [T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2 [T]he extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. [T]he extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. [I]f there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. [T]he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

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[46] City of Mobile v. Bolden, 446 U.S. 55, 63 (1980).

[47] *Id.* at 66 (emphasis added).

[48] 478 U.S. 30 (1986).

[49] *Id.* at 35.

[50] *Id.* at 36.

> 6. [W]hether political campaigns have been characterized by overt or subtle racial appeals;
> 7. [T]he extent to which members of the minority group have been elected to public office in the jurisdiction.[51]

The committee also listed the following as factors that might have probative value in some cases to support a plaintiff's claimed violation:

> [W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
> [W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[52]

In applying the test to the specific facts before it, the *Gingles* Court found that the North Carolina apportionment plan violated the Voting Rights Act with respect to the challenged multimember districts, for the following reasons: (1) racially polarized voting existed in each of the districts; (2) there was a legacy of official discrimination in voting matters, education, housing, employment, and health services; (3) there were persistent campaign appeals to racial prejudice; (4) the multidistricting scheme impaired the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice; and (5) the success of a few black candidates was too recent and limited to support a finding that the district court's analysis was clearly erroneous.[53] The "*Gingles* test" was thus established whereby Voting Rights Act plaintiffs must, to state a prima facie case, prove that: (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group "is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[54]

The Voting Rights Act as amended in 1982 and interpreted by *Gingles* did not, of course, remove all barriers to equal representation for blacks. There is still much room for improvement in, for example, voter registration rates. Deeper problems, such as a history of inferior public education in many predominantly black areas, also impede the ability of minorities to participate in the political process. However, it does appear that the United States is moving

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[51] *Id.* at 36–37.

[52] *Id.* at 37 (*quoting* S. REP. No. 97-417, 97th Cong., 2d. Sess. 26–28 (1982)).

[53] *Id.* at 79.

[54] *Id.* at 50–51.

toward the point when all blacks not only "register and vote without hindrance,"[55] but when black votes are also free from dilution. The question remains as to whether this achievement means that we have reached our goal in terms of voting rights. Does an unrestricted right to an undiluted vote present black voters with the "key" to political equality that Johnson wanted for them?

III. BEYOND THE EQUALLY WEIGHTED VOTE

More may be needed than simply the right to an undiluted vote in racially neutral districting schemes for blacks to achieve fair representation. Some argue for a significant departure from current geographically based districting schemes to enhance the representation of minority interests.[56] A less radical approach is to create districts in which blacks comprise a majority of the voters, thus guaranteeing the election of candidates preferred by blacks.

A comparison of political and economic rights must be made here, as attempts to ensure both contain many similarities. Blacks in the United States were grossly deprived of both kinds of rights in the numerous discriminatory practices that carried on after the end of slavery.[57] With regard to economic rights, the law progressed through three major phases: (1) allowing continued deprivation via segregation; (2) repudiation of the "separate but equal" myth and attempts at equality of opportunity via the Civil Rights Act of 1964; and (3) the widespread (and indeed controversial) implementation of affirmative action programs designed to remedy past discrimination via preferences for blacks in such areas as employment, academic admissions, and government contracts to ensure not only rights, but a certain degree of successful results. The law with regard to political rights has gone through only the first two of those same phases. Prior to *Baker, v. Carr*[58] many forms of unequal allocation

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[55] City of Mobile v. Bolden, 446 U.S. 55, 65 (1980).

[56] Lani Guinier, a professor at University of Pennsylvania Law School, who was at one time President Clinton's nominee to be Assistant Attorney General for Civil Rights, suggests that "multimember districts and proportional or semi-proportional representation [schemes] may work better than [majority-minority] districting as a remedy for vote dilution," because they "do not rely on territorial or residential location as a fixed proxy for interests." Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135 (1993). Amid public disapproval of Professor Guinier's ideas about voting rights, President Clinton was forced to withdraw her nomination. *The Destruction of Lani Guinier*, CHI. TRIB., June 6, 1993, at C2.

[57] *See* Gerald D. Jaynes & Robin M. Williams, Jr., eds., A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 58–60 (1989).

[58] 369 U.S. 186 (1962); *see supra* note 31 and accompanying text.

of voting rights were allowed to survive under the political question doctrine. The Voting Rights Act of 1965 (as amended), combined with *Gingles*, should succeed in creating an equal opportunity for blacks to exercise their right of suffrage. The law regarding political rights for blacks has now begun to enter a third phase that contains both similarities and differences with the law regarding traditional "economic" affirmative action plans.

The third phase for the law of political rights can be characterized by attempts not only to provide blacks with the right to an equal vote, but with rights regarding actual state legislative and congressional electoral success. The creation of majority-minority districts is the mechanism for providing this success.

The argument over whether affirmative action plans were a step in the right direction or a step backward in the attempt to provide for equality in economic rights is not one that will be settled soon. The debate over what at first may seem to be a "preference" for political rights is similarly not going to be a short one. The author only wishes to point out that there are crucial differences between traditional economic affirmative action plans and the racially conscious creation of majority-minority districts. One commentator, doubtful of the wisdom of affirmative action plans, asked:

> (1) Can the Court insist on such intrusive use of racial classification without teaching the country that policies based on racial classification are legitimate? (2) Will those who are asked to step aside for the benefit of blacks not harbor ill will against them? Will this not be a particular problem for the young, who, having grown up on this side of the civil rights revolution, disassociate themselves from the racism of the old America, and may be surprised to learn that they are asked to pay for it? (3) Will the effect of pervasive affirmative action for blacks—combined with an equal pay principle—be to ensure that blacks are systematically promoted to the level just above their competence and cause affirmative action to become an engine of group defamation? (4) Will affirmative action create incentives for employers to locate jobs away from black labor?[59]

Whatever the validity of those arguments against the use of traditional affirmative action plans, many of them do not readily transfer to the creation of majority-minority districts. No white person can claim to be the victim, or claim to be paying for the benefit of blacks, when blacks are simply allowed to elect representatives of their choice whenever they comprise a sufficiently populous geographic unit. There can also be no notion of "group defamation"

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[59] Edmund Kitch, *The Return of Color Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 SUP. CT. REV. 1, 12–13.

or of blacks achieving what they do not deserve. Although our market economy has and will continue to allocate resources unequally among people (it is so designed, so that resources are used most efficiently), our political system need not share this characteristic. It is not meant to reward efficiency, but to properly represent the electorate.[60] Although it is expressly provided in the Voting Rights Act that no racial minority can claim a right to proportional representation,[61] even in that achievement blacks could not be said to have undermined our democracy, as it is argued that affirmative action undermines our system of economic rewards.

It is true, however, that conscious creation of majority-minority districts may legitimize policies based on racial classification. The counterargument is that such policies (which may not have been achieved if the above-quoted commentator had had his way) are so ingrained in our society that further legitimization will do no damage. Affirmative action plans are widespread, though still widely debated. The most significant "racial classification" that exists, and one that is necessary for the creation of majority-minority districts, is housing segregation. It would seem insincere to deny that there is very little integration between whites and blacks in housing, and similarly insincere to deny that, as long as blacks tend to live in a geographically compact area, it is reasonable to lasso their common interests so that they may have an effective voice in our representative democracy.

IV. THREE NEW VOTING RIGHTS ACT HOLDINGS

Creating majority-minority districts is, of course, not without controversy. Some challenge the practice as "reverse discrimination" and question the ability of courts to distinguish benign from invidious racial classifications. Others claim that creating majority-minority districts falsely assumes that all blacks think alike and "vote as a herd."[62] Still others argue that some reapportionment bodies have surreptitiously created majority-minority districts to "pack" blacks into fewer districts, thus minimizing their influence. The Supreme Court addressed these issues in three cases decided in 1993.

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[60] The precise goal of our representative system is not a settled issue. Some argue that the representatives should seek to do what is "best" for the population, that our representatives are trustees acting for the electorate's interests. Others argue that our representatives should not make value judgments about what views are better than others, that they are not trustees but are more like agents, and should simply vote as their constituents would. ESKRIDGE & FRICKEY, *supra* note 18, at 94.

[61] 42 U.S.C. § 1973b (1992).

[62] George F. Will, *Districting by Pigmentation*, NEWSWEEK, July 12, 1993, at 72.

A. Growe v. Emison

Growe v. Emison[63] primarily involved the power of federal courts to intervene in state reapportionment proceedings,[64] but also included an

[63] 113 S. Ct. 1075 (1993).

[64] A group of voters brought a state-court action against the Minnesota Secretary of State, alleging that the state's congressional and legislative districts were malapportioned in light of population shifts illuminated by the 1990 census. *Id* at 1076. The parties stipulated that the current apportionments were unconstitutional, and the Minnesota Supreme Court appointed a panel to create new apportionment plans. *Id.* at 1078. A second group of voters sued in federal court on similar grounds and also included a challenge under section two of the Voting Rights Act. *Id.* A panel of three federal judges was appointed to decide the challenge pursuant to 28 U.S.C. § 2284(a). *Id.* (The statute provides that "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a)).

The Minnesota Legislature was designing new state legislative districts when the federal and state actions were filed, and it adopted a reapportionment plan shortly thereafter. Growe v. Emison, 113 S. Ct. 1075, 1076 (1993). The new plan was replete with technical errors, however, forcing the Legislature to draft corrective amendments. *Id.* at 1078. While the enactment of the amendments was pending, another group of plaintiffs filed a second action in federal court against the Secretary of State, alleging state and federal constitutional violations of the adopted (but not yet corrected) plan. *Id.* The three-judge district court panel agreed to defer further proceedings pending action by the Minnesota Legislature, but refused to defer until the state court had a chance to review the Legislature's soon-to-be corrected plan. *Id.* at 1079. The district court set a deadline for legislative action and directed special masters to develop contingent reapportionment plans for both congressional and state legislative districts. *Id.*

Meanwhile, the special redistricting panel, appointed by the state supreme court, held that the not-yet-corrected state legislative plan was unconstitutional and invited the parties to submit alternative plans. *Id.* at 1078. Shortly thereafter, the state court issued an order containing its legislative plan, which was to take effect if the Legislature failed to act by a certain deadline. *Id.* at 1079. The federal district court panel then stayed all proceedings of the state court and issued an injunction preventing the parties from implementing the state court's orders, "explain[ing] its action as necessary to prevent the state court from interfering with the Legislature's efforts to redistrict and with the District Court's jurisdiction." *Id.* The Supreme Court, upon request of the state-court plaintiffs, vacated the injunction, thus allowing the Legislature to both correct the state legislative reapportionment plan and adopt a new congressional redistricting plan. *Id.* Both actions, however, were vetoed by the Governor. *Id.* The state court issued an order adopting its state legislative plan and began to hold hearings on competing congressional redistricting plans. *Id.* "Two days later, the district court issued an order adopting its own legislative and congressional

important holding regarding the Voting Rights Act. The district court had concluded that minority vote dilution existed in part of Minneapolis, in violation of section two of the Act.[65] The district court reached its conclusion, however, without applying the *Gingles* test, assuming that such application was not necessary in the single-member district context.[66] The Supreme Court held that the *Gingles* test does indeed apply to single-member districts.[67] Stating its preference for single-member districts for federal-court-ordered reapportionment, because multimember and at-large district plans "generally pose greater threats to minority-voter participation in the political process," the Court pointed out that "[i]t would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district."[68]

The Court also reasoned that the basis for the *Gingles* preconditions applies equally to single-member and multimember districts:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.[69]

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districting plans [drawn by its special masters] and permanently enjoining interference with state implementation of those plans." *Id.* The district court rejected the state court's state legislative plan on the ground that it "'fail[ed] to provide the equitable relief necessary to cure the violation of the Voting Rights Act,' which in its view required at least one 'super-majority minority' Senate district . . . ." *Id.* The district court also retained jurisdiction to ensure adoption of its plans. *Id.*

The Supreme Court's primary holding, via a unanimous opinion written by Justice Scalia, was that the district court "erred in not deferring to the Minnesota [state court] proceedings." *Id.* at 1080. Although federal courts generally need not abstain from action when they exercise jurisdiction over the same subject matter concurrently with state courts, the reapportionment context is one of the "rare circumstances" when "principles of federalism and comity dictate otherwise." *Id.* Thus the district court's injunction of state-court proceedings, previously vacated by the Supreme Court, was clearly erroneous.

65 113 S. Ct. 1075, 1083 (1993).

66 *Id.*

67 *Id.* at 1084.

68 *Id.*

69 *Id.* (citations omitted).

Because the minority population identified by the district court was comprised of several distinct ethnic and language minority groups, and courts may not presume bloc voting within even a single minority group, proof of political cohesion among the various groups was "all the more essential."[70]

The Court found not only that the *Gingles* preconditions were ignored, but that they were also unattainable given the complete absence of evidence of minority political cohesion (even within a single ethnic group) in the record.[71] The case was remanded with instructions to dismiss.[72]

B. Voinovich v. Quilter

In *Voinovich v. Quilter*,[73] the Supreme Court addressed a three-judge district court panel's finding that Ohio's state legislative reapportionment violated the Voting Rights Act.[74] The Court once again, in a unanimous opinion delivered this time by Justice O'Connor, overruled a district court's attempt to influence the apportionment process.

Ohio's Constitution provides that its state legislative districts be reapportioned every ten years, in the year following the federal decennial census.[75] The reapportionment process is conducted by the Ohio Apportionment Board, consisting of representatives of the Governor, Secretary of State, Auditor of State, and two persons (from different parties) chosen by the legislative leaders.[76] Republicans held a three to two majority on the 1991 Board (Governor, Secretary of State, and one legislative appointee), and appointed the chief executive officer of the Republican-controlled Ohio Senate, James Tilling, to be the Board's secretary.[77] The majority members directed that Tilling draft and submit on their behalf a reapportionment plan that complied "with all applicable federal statutes [and] with special emphasis to be paid to conforming with the provisions of the federal Voting Rights Act."[78]

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[70] *Id.* at 1085. The Court assumed without deciding that distinct ethnic and language minority groups can be combined for purposes of section two. *Id.*

[71] *Id.*

[72] *Id.*

[73] 113 S. Ct. 1149 (1993).

[74] *Id.* at 1151.

[75] OHIO CONST. art. XI, §§ 1, 6.

[76] OHIO CONST. art. XI, § 1.

[77] Brief for Appellant at 3, Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

[78] Joint Appendix at 272, Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

Tilling was instructed specifically to "create representative districts which maximized the effective representation of Ohio's significant ethnic and racial minorities."[79] Pursuant to the Board majority's instructions, and after extensive consultation with black leaders and black elected officials, Tilling submitted an apportionment plan that included eight majority-minority Ohio House of Representatives districts.[80] The 1981 apportionment plan included four majority-minority Ohio House districts.[81] After some minor adjustments, the Board adopted the plan submitted by Tilling in a three to two party-line vote.[82] The plan included black voting age populations ranging from fifty percent to sixty-five percent.[83] The two dissenting members of the Board, joined by several state representatives and other interested parties, sued in the U.S. District Court for the Northern District of Ohio.[84] The plaintiff-appellees alleged, *inter alia*, that the Board's plan violated section two of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment.[85] The district court held that the Board's plan impermissibly packed minority voters in violation of the Voting Rights Act:

> In the absence of [a totality of the circumstances] analysis, there can be no reliable finding of a violation. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.[86]

The district court ordered the Apportionment Board to either justify its existing plan under the totality of the circumstances test or to submit a revised plan to the court within twenty days.[87] The defendant-appellants, while reserving their

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[79] *Id.*

[80] Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993).

[81] Quilter v. Voinovich, 794 F. Supp. 695, 707 (N.D. Ohio 1992) (Dowd, J., dissenting), *rev'd*, 113 S. Ct. 1149 (1993).

[82] Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993).

[83] FRANK R. PARKER, *Are States Permitted to Create Majority Minority Districts when There Is No Voting Rights Act Violation?*, 1992-93 ABA PREVIEW OF UNITED STATES SUPREME COURT CASES 157.

[84] Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993).

[85] *Id.*

[86] Quilter v. Voinovich, 794 F. Supp. 695, 701 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

[87] *Id.*

right to appeal the court's order,[88] conducted a totality of the circumstances analysis and submitted their findings to the court.[89] The Apportionment Board submitted a slightly different plan this time, after making several minor corrections pursuant to a separate legal challenge under the Ohio Constitution.[90] The Apportionment Board's new plan included five majority-minority Ohio House districts, with black voting age populations ranging from fifty-three percent to sixty-five percent.[91] The district court found the Board's totality of the circumstances analysis insufficient to "justify its wholesale creation of majority-minority districts, thus rendering [it] violative of the Voting Rights Act of 1965."[92] The court also summarily noted that the plan violated the Fifteenth Amendment, enjoined the May 5, 1992 primary election, and appointed a special master to prepare an acceptable plan.[93] Appellants moved for a stay of the order, and in an order denying the motion,[94] the district court expounded upon its prior analysis and found that the Board's plan had also violated the Fourteenth Amendment.[95] The appellants' application to the Supreme Court for a stay of the district court order was granted,[96] and the 1992 election was conducted using the Board's amended plan.[97]

In addressing the alleged Voting Rights Act violation, the Supreme Court first distinguished the *Quilter* plaintiffs' "influence dilution" claim from the typical section two claim that the complaining group was deprived of a certain number of districts in which the group comprises a majority. While specifically not deciding whether such influence dilution claims are cognizable under section two, the Court assumed arguendo that they are.[98]

Next, the Court rejected the district court's holding that section two

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[88] Brief for Appellants at 17, Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

[89] Quilter v. Voinovich, 794 F. Supp. 756, 756 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

[90] *See* Voinovich v. Ferguson, 586 N.E.2d 1020 (Ohio 1992) (holding that the plan violated the Ohio Constitution by unnecessarily splitting political subdivisions).

[91] PARKER, *supra* note 83, at 158.

[92] Quilter v. Voinovich, 794 F. Supp. 756, 756 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

[93] *Id.*

[94] Quilter v. Voinovich, No. 5:91 CV 2219 (N.D. Ohio Dec. 24, 1991) (order denying motion for stay), *reprinted in* Appendix to Jurisdictional Statement at 127a, Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992), *rev'd*, 113 S. Ct. 1149 (1993).

[95] *Id.* at 146a.

[96] Voinovich v. Quilter, 112 S. Ct. 1663 (1992).

[97] PARKER, *supra* note 83, at 158.

[98] Voinovich v. Quilter, 113 S. Ct. 1149, 1151 (1993).

"prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation."[99] On the contrary, the Court emphasized that reapportionment "is the domain of the States,"[100] that "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law,"[101] and that "courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements."[102] Finally, the Court noted that the three *Gingles* preconditions for a Voting Rights Act violation apply to single-member as well as multimember districts,[103] and that the third factor, sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice, was not present here. In asserting their claim, the Court noted, the plaintiffs in *Quilter* expressly denied the existence of racial bloc voting.[104] They claimed that the absence of such bloc voting precluded the Apportionment Board from attempting to "remedy" a Voting Rights Act violation. The fundamental error with this argument, confirmed by the Court's holding, is that in the absence of racial bloc voting, any attempt to fracture the minority vote would be fruitless. There would be no "minority vote" to fracture. In the absence of racial bloc voting, an attempt to increase the minority percentage in certain districts may be unwise in that it would serve no purpose. It could not be said, however, to have diluted the votes of minorities in violation of the Voting Rights Act. Thus the Court reversed the district court's finding of a section two violation.[105]

The Court next addressed the district court's finding that the reapportionment plan violated the Fifteenth Amendment because the Apportionment Board intentionally diluted minority voting strength. The Court reserved the question of whether the Fifteenth Amendment applies to vote dilution claims, noting that it has never held any legislative apportionment inconsistent with the Fifteenth Amendment.[106] Assuming that the Fifteenth Amendment does apply to dilution claims, the Court here found the district court clearly erroneous in its factual finding of intentional discrimination.[107]

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[99] *Id.* at 1156.

[100] *Id.* at 1157.

[101] *Id.* (quotation omitted).

[102] *Id.*

[103] Per the Court's decision in Growe v. Emison, 113 S. Ct. 1075 (1993). *See supra* notes 63–72.

[104] 113 S. Ct. 1149, 1158 (1993).

[105] *Id.*

[106] *Id.*

[107] *Id.*

The district court had found intentional discrimination when: (1) Tilling disregarded the Ohio Constitution when he believed it conflicted with the Voting Rights Act; and (2) Tilling possessed documents prepared by Democrats speculating how Republicans might take partisan advantage of the Voting Rights Act.[108] The Court found that Tilling's disregard of the Ohio Constitution was merely obedience to the Supremacy Clause and that the record included no evidence that Tilling had used the Democrat-prepared documents.[109]

Finally, the Court addressed the district court's holding that "the plan violated the Fourteenth Amendment because it created legislative districts of unequal size."[110] Although the plan included population deviations larger than the ten percent which is routinely held to be permissible, the district court failed to consider whether the deviations were justified by rational state objectives, such as preserving political boundaries.[111] Responding to the district court's holding that deviations cannot be so justified, the Court stated that "[o]ur case law is directly to the contrary."[112] The Court then remanded the case to the district court for such a consideration.[113]

C. Shaw v. Reno

In its third reapportionment case of 1993, the Supreme Court was neither unanimous nor approving of the challenged apportionment plan. In *Shaw v. Reno*[114] Justice O'Connor, writing for a five to four majority, took a step back from *Voinovich's* general approval of majority-minority district creation in a challenge to North Carolina's 1990 congressional reapportionment.[115]

North Carolina, a section five state,[116] submitted a 1990 congressional reapportionment plan that included one majority-minority (black) district to the U.S. Attorney General for pre-clearance.[117] The Attorney General rejected the plan, claiming that the North Carolina General Assembly "could have created a second majority-minority district 'to give effect to black and Native American

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[108] *Id.*
[109] *Id.* at 1158–59.
[110] *Id.* at 1159.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Shaw v. Reno, 113 S. Ct. 2816 (1993).
[115] *Id.*
[116] *See supra* notes 15–22.
[117] 113 S. Ct. at 2820.

voting strength in this area.'"[118] Subsequently, the General Assembly enacted a revised plan that included a second majority-minority district.[119] The shape of the majority-minority districts became the focus of numerous articles in the popular press and is the focus of Justice O'Connor's opinion:

> The first of the . . . districts is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border. [It] has been compared to a "Rorschach ink-blot test," and a "bug splattered on a windshield."
>
> The second . . . district . . . is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'"[120]

Although the Attorney General approved North Carolina's revised plan, it was challenged both on political and racial gerrymandering grounds. The political gerrymandering claim, stated under *Davis v. Bandemer*,[121] was dismissed by the district court and affirmed on appeal by the Supreme Court.[122] The racial gerrymandering claim was stated under the Fourteenth and Fifteenth Amendments and alleged that the majority-minority districts were created such that "'black voters [were] concentrated arbitrarily—without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions' with the purpose 'to create [districts] along racial lines' and to assure the election of two black representatives to Congress."[123] The district court dismissed the racial gerrymandering claim as well, on jurisdictional grounds for certain of the defendants and generally on the basis that race-based districting is nowhere prohibited by the

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[118] *Id.* (citation omitted).

[119] *Id.*

[120] *Id.* at 2820–21 (citations omitted).

[121] 478 U.S. 109 (1986).

[122] 113 S. Ct. 2816, 2821 (1993).

[123] *Id.*

Constitution.[124]

Justice O'Connor's opinion first recounted the Nation's sad history of racial discrimination, especially with regard to voting rights, noting that "[i]t is unsettling how closely the [challenged] North Carolina plan resembles the most egregious racial gerrymanders of the past."[125] Justice O'Connor then delineated the precise nature of the issue before the Court: whether "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" can serve as the basis of an Equal Protection Clause claim.[126]

Under the Court's "levels of scrutiny" analysis of Equal Protection claims, "state legislation that expressly distinguishes among citizens because of their race" must "be narrowly tailored to further a compelling governmental interest."[127] "Strict scrutiny" applies not only to statutes that make explicit racial classifications but also to those that cannot be rationally explained on nonracial grounds, such as prior attempts to exclude black voters by imposing literacy requirements that exempted whites via "grandfather clauses."[128] Thus, an Equal Protection claim may rest on the ground that a reapportionment plan was drawn solely on the basis of race.

The Court noted that, unlike most other state lawmaking, in the reapportionment context state legislators are keenly aware of how the law affects various racial groups. Sophisticated computer applications give reapportionment bodies ready access to a variety of demographic information about voters, including race, "age, economic status, religious and political persuasion," and a variety of other factors.[129] State legislatures may, when members of a minority live together, create majority-minority districts legitimately "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions."[130]

The *Shaw* opinion stresses that the so-called traditional apportionment criteria of maintaining political subdivisons and grouping those with similar demographic characteristics are not constitutionally mandated, but that these factors may be used to defeat a claim of gerrymandering solely on racial

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[124] *Id.* at 2821–22.
[125] *Id.* at 2824.
[126] *Id.*
[127] *Id.* at 2825.
[128] *Id.*
[129] *Id.* at 2826.
[130] *Id.*

grounds.[131] That is, these other factors can serve as the compelling government interest required for racial classifications to survive strict scrutiny. Reapportionment solely on the basis of race, per the Court,

> bears an uncomfortable resemblance to political apartheid [and] reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.[132]

Finding such perpetuating racial segregation to be "at war with the democratic ideal," the Court found that the plaintiffs here stated a cognizable Equal Protection claim and remanded the case for a determination of whether the apportionment plan was narrowly tailored to further a compelling governmental interest.[133]

V. CONCLUSION

The unanimous *Growe* and *Voinovich* opinions thus reaffirm the primacy of state government in the apportionment process and sanction the use of race as an input in the apportionment equation. *Shaw*, however, adds a narrow qualification to unfettered states' rights in designing apportionment plans: districts cannot be drawn *solely* on the basis of race. A racial classification can only be justified by compelling government interests, which may be provided by including other factors in the apportionment equation.

The qualification established by *Shaw* is both illogical and unworkable in application. The Court offers no analysis of how much other factors must be considered in addition to race, but only that there be other factors. It is inconceivable that a legislative apportionment body, now aware of the *Shaw* holding, will fail to produce evidence of non-race factors in even the most racially motivated apportionment. In addition, the Court's reliance on unspecified and tradition-based factors (*i.e.* preservation of political subdivisions) to overcome strict scrutiny analysis would, if applied to other racial issues, make strict scrutiny much less "strict." Surely the Court would not allow a similar unspecified rationale to overcome strict scrutiny in, say, employment law. The problem is that strict scrutiny has no place here, in an

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131 *Id.* at 2827.

132 *Id.*

133 *Id.*

area that is the proper province of unfettered state politics. So long as those political processes do not violate the Voting Rights Act, the Court should defer to them.

Sean P. Dunn